No. 36683-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Niccole Charles,

Appellant.

Clallam County Superior Court

Cause No. 07-1-00238-2

The Honorable Kenneth D. Williams

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Niccole Charles' constitutional right to compulsory process was violated.

2. The trial court erred by allowing impeachment of Ms. Kreaman with extrinsic evidence in violation of ER 613(b).

3. The trial court erred by giving an aggressor instruction in the absence of evidence that Ms. Charles provoked the need to act in self-defense.

4. The trial court erred by giving Instruction No. 13, which reads:

> **No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the Defendant was the aggressor, and that the Defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.** Instruction No. 13, Supp. CP.

5. The trial court erred by giving incomplete instructions on the law of self-defense.

6. The trial court's self-defense instructions failed to make the relevant legal standard manifestly apparent to the average juror.

7. The trial court's incomplete self-defense instructions allowed conviction without proof of all the elements of the crime.

8. The trial court erred by giving a "no duty to retreat" instruction.

9. Ms. Charles was denied the effective assistance of counsel by her attorney's failure to propose a "no duty to retreat" instruction.

10. The statutory and judicial scheme criminalizing assault violates the separation of powers doctrine.

11. The trial court erred by instructing the jury with a definition of "assault" created and expanded by the judiciary.

12. The trial court erred by giving Instruction No. 8, which reads as follows:

> An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
> Instruction No. 8, Supp CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Niccole Charles was charged with assaulting another inmate (Debra Tvrdik) while in custody at the Clallam County Jail. At the time of trial, one of Ms. Charles' witnesses (Ms. Kreaman) was in state custody serving a DOSA sentence at a treatment facility. Defense counsel sought and obtained orders requiring the state to transport Ms. Kreaman for trial. The state failed to do so, and, on the eve of trial, the court excused the state's failure and directed defense counsel to arrange for bus transportation at public expense.

Defense counsel arranged for bus transportation, but on the second day of trial, the DOSA treatment facility refused to allow Ms. Kreaman to travel unescorted. Ms. Kreaman provided telephonic testimony instead of live testimony in the jury's presence. Because Ms. Kreaman's testimony directly contradicted the testimony of state witnesses, her credibility was important to Ms. Charles' defense.

> 1. Did the state violate Ms. Charles' constitutional right to compulsory process by failing to produce a witness in state custody? Assignment of Error No. 1.

During Ms. Kreaman's testimony, the prosecutor made reference to a prior statement she had made, but did not show the statement to Ms. Kreaman, and did not give her an opportunity to explain or deny it. Over objection, the trial judge allowed the prosecutor to impeach Ms. Kreaman with extrinsic evidence of her allegedly inconsistent statement.

> 2. Did the trial judge violate ER 613(b) by allowing impeachment with extrinsic evidence without giving Ms. Kreaman an opportunity to explain or deny her alleged inconsistent statement

and without giving defense counsel an opportunity to interrogate Ms. Kreaman about the statement? Assignment of Error No. 2.

Defense witnesses testified that Ms. Charles acted in self-defense after being struck by Tvrdik. The trial court instructed the jury on self-defense, but also gave an instruction that Ms. Charles could not use force in self-defense if she were the aggressor. The trial court did not point to any evidence of an intentional unlawful act reasonably calculated to provoke a belligerent response. The trial court did not give an instruction explaining that Ms. Charles had no duty to retreat.

During closing, the prosecutor argued that the aggressive act occurred when Ms. Charles followed Tvrdik to her cell after being insulted by Tvrdik. The prosecutor also argued that Ms. Charles could have retreated from the conflict.

3. Did the trial court err by giving an aggressor instruction where there was no evidence that Ms. Charles created the need for acting in self-defense? Assignments of Error Nos. 3, 4, 5.

4. Did the trial court err by giving an aggressor instruction where there was no evidence that Ms. Charles performed an intentional act reasonably likely to provoke a belligerent response? Assignments of Error Nos. 3, 4, 5, 6, 7.

5. Did the trial court err by giving an aggressor instruction where there was no evidence that Ms. Charles performed an intentional act separate from the alleged crime? Assignments of Error Nos. 3, 4, 5, 6, 7.

6. Did the trial court err by giving an aggressor instruction where there was no evidence that Ms. Charles performed an unlawful act? Assignments of Error Nos. 3, 4, 5, 6, 7.

7. Did the trial court err by failing to explain to the jury that Ms. Charles had no duty to retreat from the conflict? Assignments of Error Nos. 3, 4, 8.

8. Was Ms. Charles denied the effective assistance of counsel by her attorney's failure to propose a "no duty to retreat" instruction? Assignments of Error Nos. 3, 4, 8.

The Washington legislature has criminalized assault, but has not defined the core meaning of that crime. In the absence of a legislative definition, the judiciary has, over the course of more than a century, defined and expanded the core meaning of assault without input from the legislature.

9. Does the legislature's failure to define "assault" violate the constitutional separation of powers? Assignments of Error Nos. 10, 11, 12.

10. Does the judicially created definition of "assault" violate the constitutional separation of powers? Assignments of Error Nos. 10, 11, 12.

11. Does the judicial expansion of the crime of assault without legislative input violate the constitutional separation of powers? Assignments of Error Nos. 10, 11, 12.

12. Does the separation of powers doctrine require the legislature to define crimes with something more than a bare circular reference to the crime itself? Assignments of Error Nos. 10, 11, 12.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In the M pod of the Clallam County jail on May 5, 2007, the women were lining up to pick up their lunch trays. RP (8/14/07) 38-39, 122. Debra Tvrdik sat in a seat in which Niccole Charles had been accustomed to sit. RP (8/14/07) 124, 139, 168. Either Ms. Charles or Sheryl Kreaman told Tvrdik that it was Charles' seat. RP (8/14/07) 40, 122, 192; RP (8/15/07) 25. Tvrdik responded that she didn't realize seats were assigned, that she would eat in her room, and that the women at the table were bitches. RP (8/14/07) 122, 192; RP (8/15/07) 25, 27. Tvrdik got up and called Ms. Charles a "stupid bitch." RP (8/14/07) 122.

Ms. Charles replied that she was not a stupid bitch. Tvrdik said that she was right, Charles was a "stupid cunt." RP (8/14/07) 41-42, 172, 180, 209, 212; RP (8/15/07) 27-28. One witness described Tvrdik's behavior as egging Ms. Charles into a fight; another said that even after the incident, Tvrdik continued to provoke Ms. Charles and "talk shit" to her. RP (8/14/07) 170, 172, 181-184.

After being called a "stupid cunt," Ms. Charles followed Tvrdik to her cell. RP (8/14/07) 123; RP (8/15/07) 113. What occurred next was in dispute. Ms. Charles testified that she was attacked by Tvrdik, and

defended herself. RP (8/15/07) 136-138. Kreaman confirmed that Tvrdik swung at Ms. Charles and kicked at her, and that Ms. Charles tried to block the blows. RP (8/15/07) 29-31. Inmate Sophia Trujillo-Akuna testified that Tvrdik swung at and kicked at Ms. Charles, who tried to defend herself. RP (8/15/07) 95-96, 114, 121-123. On the other hand, Tvrdik claimed that Ms. Charles hit her in the face without provocation, and then pounded on her head while she was on the ground. RP (8/14/07) 196-197. Inmate Sabrina Madrigal testified that Charles hit Tvrdik repeatedly in the face and kicked her when she was on the floor, and that Tvrdik didn't even try to hit Charles. RP (8/14/07) 44-47.

Following the incident, Tvrdik had a bloody nose, bruises, and lacerations on her head. RP (8/13/07) 57, 64, 66, 77; RP (8/14/07) 113. Ms. Charles was charged with Assault in the Second Degree. CP 21.

Ms. Charles' attorney sought to compel the attendance of two of the inmates who had witnessed the fight.[1] He first raised the issue on July 11, 2007, noting that Sheryl Kreaman was in the Pioneer Center DOSA treatment facility in Des Moines, Washington, and that the state would need to transport her for trial. RP (7/11/07) 15. A discussion about the logistics of the transport ensued:

---

[1] Natasha Dinglasan was transported to trial but invoked her right to remain silent as she had charges pending out of the melee. RP (8/14/07) 222.

MR. DAVIS: I guess we'd need a transport order and that would need to be signed by the Court, submitted by defense counsel. They're his witnesses not mine.

MR. COUGHENOUR: Well, if it's understood that I can get a transport order and the State will take care of that transport for both of those people—

THE COURT: Certainly one at Echo Glen would be – the one at Pioneer West would be problematic in terms of getting her here. DOC takes the position that they are not in DOC care when they are in the residential phase of treatment.

MR. DAVIS: I see, hmm.

MR. COUGHENOUR: So who's –-

MR. DAVIS: She's in the care of Pioneer Center West, isn't she, and that's a little long I suppose to Pioneer Center West?

THE COURT: It's in SeaTac.

MR. COUGHENOUR: So, I'm just raising these because I don't want to be ready and prepared for trial and not able to get these people.

THE COURT: That may be one of those that may take the old chain – county to county chain to get her here.

MR. DAVIS: What's the county to county chain – go to the line and bring them in?

MR. COUGHENOUR: I'm not sure – I don't know that her circumstances – isn't she on a DOSSA [sic]?

THE COURT: Yes.

MR. COUGHENOUR: So under that circumstance, if she's on I guess a local DOSSA [sic], when she's done with that program where does she go?

THE COURT: Community custody?

THE DEFENDANT: She has no idea where she's going to live when she gets out.

THE COURT: DOC would approve her living –

MR. COUGHENOUR: So I don't know where she's going to go and I want to be sure she's available and she's already made a statement that the alleged victim was the aggressor in this incident and so has Ms. Dinglasan.

RP (7/11/07) 15-17.

Defense counsel filed a motion to transport Kreaman on July 20, 2007, and the court granted the motion. Supp. CP; RP (7/20/07) 8-9.

Trial was scheduled to begin on July 30, 2007; as of that day, Kreaman and another defense witness had not been transported. RP (7/30/07) 5. According to defense counsel,

> Two of our witnesses are under State control. …Sheryl Kreaman is also a witness on behalf of the defense. Sheryl Kreaman was sentenced to Pioneer and I'm not sure if it was West or North, but Sheryl Kreaman is – and I made these calls late Friday. Sheryl Kreaman, I believe is at DOSA, Pioneer DOSA West and Pioneer DOSA West says we don't transport anybody and she'd ordered to be there by Judge Williams. Judge Williams signed the transport order, ordering her to be transported here by one o'clock on Monday and she also isn't being transported. So, the two primary witnesses for Ms. Charles, who I specifically got orders last week saying the State had to have them here by one o'clock today, neither is here under circumstances totally beyond my control and all within the control of the State who has both of those people under their care; one in DOSA, one in Echo Glen. RP (7/30/07) 5-6.

The following colloquy took place:

> MR. DAVIS: That is information that we were not aware of. I think we learned – I think I got a message, a telephone message from Ms. Fors I Friday. I wasn't here on Friday. She also communicated, I think with Mr. Coughenour that DOC Pioneer West or whatever they call themselves, the residential DOSA people don't transport and I wasn't present on Friday when apparently Judge Williams said we can get her here, somehow or another and I don't know what the situation is but I haven't…
>
> THE COURT: Well, I have a note here that apparently is in the file that Ms. Fors put in there that she did talk to him, that Ed Thomas at DOC said that she's there and they're not going to transport her and she got some numbers from Ed Thomas also from a Jeanie Whit.
>
> MR. COUGHENOUR: Jeanie Whitty.
>
> THE COURT: Jeanie Whitty at Pioneer West.
>
> MR. COUGHENOUR: Pioneer West and they don't transport.

> THE COURT: They don't transport, okay.
> MR. COUGHENOUR: And, that's the – she's a clear witness for the self defense.
> THE COURT: Where is Echo Glen, is that …
> MR. COUGHENOUR: That's Snoqualmie, that's near North Bend, I think.
> THE COURT: Okay, so maybe they will pick up both of them at the same time.
> MR. DAVIS: I don't know where Pioneer Center West is.
> THE COURT: It's in SeaTac.
> MR. DAVIS: Oh.
> MR. COUGHENOUR: Pioneer Center West is at 21202 Pacific Highway South, SeaTac. Now, their big concern was that if they come and pick her up where does she stay if she's in residential treatment and she's not under closed custody, so she doesn't stay in jail.
> THE COURT: We can work that out.
> RP (7/30/07) 7-8.

The hearing ended with the court resetting the trial and instructing the state to look into the matter and "find out what we need to do to get Ms. Kreaman . . . here." RP (7/30/07) 18.

On the Friday before the anticipated Monday trial, the parties again gathered to confirm that the case was ready for trial. RP (8/10/07) 7-12. The defense noted that Ms. Kreaman had still not been transported. RP (8/10/07) 8. At that point, it was determined that neither DOC nor the sheriff's department would transport, and the prosecutor refused to take any further steps to ensure Kreaman would be present to testify at trial. RP (8/10/07) 8-9. The court told defense counsel that he was responsible for securing her presence (despite the fact that she was in state custody),

and suggested that defense counsel get Kreaman a bus ticket at public expense. After expressing his frustration at the state's last-minute refusal to transport Kreaman from the DOSA facility, defense counsel agreed to obtain a bus ticket for her. RP (8/10/07) 8-12.

Trial began as scheduled on Monday August 13, 2007. RP (8/13/07) 7. Ms. Kreaman had not been transported by the end of the first day. RP (8/13/07) 116. On the second day of trial, defense counsel informed the court that the DOSA staff would not allow Ms. Kreaman to use the bus ticket that was provided for her:

> … I need to at this point probably the best time to let the Court know what my – what the results are in regard to Ms. Kreaman.
>
> I called, again, Whitney [sic] over at DOSSA [sic] West again this morning and indicated they don't have anybody to bring her over. They suggested telephonic testimony and they have a situation where they can do it telephonically.
>
> So at this point I think that's really my only recourse, to allow her to testify telephonically and to me at the point it makes the most sense, because the State isn't willing to go transport her and I can't and DOSSA [sic] won't let her take the bus round trip that I have made arrangements for Friday afternoon, and I think telephonic testimony is really my only way to go.
>
> THE COURT: Mr. Davis?
>
> MR. DAVIS: Your Honor, I take exception to the assertion or allegation that the State won't transport. We have no responsibility and we don't have the means of doing it either and that was made clear to Mr. Coughenour by the Court last Friday.
>
> With respect to the need for telephonic testimony, if there is no alternative then that is what has to happen and I have no objection to that.
>
> THE COURT: I will authorize telephonic testimony of Ms. Kreaman in this case.

> MR. COUGHENOUR: Your Honor, and I'm just going to renew that objection, when the State says they have no way to transport when she's in a State run facility, it is not right.
>
> THE COURT: All right.
>
> Well, and I under – I understand, and the issue, frankly, is Department of Corrections takes the position that while they are in a institution with treatment being funded by the Department of Corrections and are on community custody, they are not in custody in the fullest sense of that term by DOC. They have – they do not believe they have a [sic] obligation to transport. And obviously that's an issue that occasionally will have to come up. The same problem arises, frankly, in putting them back in jail for violations and there's a big debate over whether that's DOC's bill [sic] or the county's bill.
>
> So those are issues which in one case don't seem to make much sense but when you multiply that by the number of defendants it might apply to, that's a lot of money the departments are fighting over. That's quite a problem.
>
> RP (8/14/07) 7-9.

Kreaman testified by phone. RP (8/15/07) 20-58. At the end of her redirect examination, Kreaman testified that her statement to the police included the same information contained in her trial testimony. RP (8/15/07) 58. The state called Deputy Boyd in rebuttal. Defense counsel objected that Kreaman had not been confronted with any prior statements, and that extrinsic evidence of any prior statements was therefore inadmissible. RP (8/15/07) 160. The court overruled the objection and allowed the officer to relate the content of Kreaman's statement. RP (8/15/07) 160-180.

The court gave instructions on self-defense, but did not give a "no duty to retreat" instruction. Instructions, Supp. CP. At the prosecutor's

request, the court gave a "primary aggressor" instruction. Instruction No. 13, Supp. CP. In closing argument, the prosecutor told the jury that Ms. Charles was the aggressor because she followed Tvrdik to her cell. RP (8/15/07) 215-216. In addition, the prosecutor repeatedly emphasized to the jury that Ms. Charles could have left Tvrdik's cell to avoid the conflict. RP (8/15/07) 215, 216, 244.

Ms. Charles was convicted of Assault in the Second Degree and sentenced within her standard range. She timely appealed from the judgment and sentence. CP 9-20, 5.

ARGUMENT

I. THE STATE VIOLATED NICCOLE CHARLES' CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS BY REFUSING TO PRODUCE A WITNESS IN STATE CUSTODY.

Article I, Section 22 provides, *inter alia*, that

> In criminal prosecutions the accused shall have the right…to have compulsory process to compel the attendance of witnesses in his own behalf…
> Wash. Const. Article I, Section 22.

The Sixth Amendment, applicable to the states through the due process clause of the Fourteenth Amendment, also guarantees the right to compulsory process. U.S. Const. Amend. VI; U.S. Const. Amend. XIV. The U.S. Supreme Court has held that "[t]the right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms

the right to present a defense [and] is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14 at 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

The constitutional right to compulsory process is violated whenever an act or omission attributed to the state causes the loss or erosion of material testimony favorable to the accused. *United States v. Hoffman*, 832 F.2d 1299 at 1303 (1st Cir. 1987); *see also United States v. Theresius Filippi*, 918 F.2d 244 at 248 (1st Cir. 1990). For example, in *Filippi*, a defense witness "was unable on his own to overcome the immigration hurdles blocking his entry into the United States." *Filippi*, at 248. The U.S. Attorney could have requested a 'Special Interest Parole' from the INS, but did not, despite requests from defense counsel and the trial judge. The Court of Appeals held that this "deliberate omission to act [sic], where action was required, by the United States Attorney constitutes a violation of the Sixth Amendment right to compulsory process and, derivatively, the right to due process protected by the Fifth Amendment." *Filippi*, at 248.[2]

[2] The Court refused to reverse the conviction, finding that trial counsel waived the accused's right to compulsory process by failing to raise the issue until the eve of trial, and by commencing trial knowing that the witness would not be able to attend.

Both the confrontation clause and the compulsory process clause reflect the constitution's preference for live testimony. U.S. Const. Amend. VI; Wash. Const. Article I, Section 22. Live testimony is strongly favored "so that the fact finder may observe the witnesses' demeanor to determine their veracity." *Kinsman v. Englander*, 140 Wn. App. 835 at 844, 167 P.3d 622 (2007); *see also People v. Bryant*, 157 Cal. App. 3d 582 at 595, 203 Cal. Rptr 733 (1984) ("Appellant had the right to present 'live witnesses' at his trial. Respondent's argument that the preliminary hearing transcript could have been introduced because [the witness became unavailable] offers an insufficient substitute for the proper presentation of appellant's defense.")

As one commentator notes,

> The American trial system is premised on the assumption that optimal fact-finding will occur when the court hears live testimony from each witness, watches the cross-examination of each witness, and sees for itself each witness' demeanor, sincerity, and memory of alleged events. Thereby, the court and the jury can assess whether the evidence offered by the witness is credible.
> Dana D. Anderson, *Note: Assessing The Reliability Of Child Testimony In Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2123 (1996).

In this case, defense counsel was thwarted in his repeated efforts to procure the attendance of Kreaman for live testimony in court. RP (7/11/07) 15-17; RP (7/20/07) 8-9; RP (7/30/07) 5-8, 18; RP (8/9/07) 8; RP (8/10/07) 8-12; RP (8/14/07) 7-9. Kreaman was in state custody,

serving a DOSA sentence, and the trial judge signed an order more than once requiring that she brought to court for trial. Supp. CP. After the issue was first raised, the state made no objection to these orders until the eve of trial, when the trial court reversed itself without warning and instructed defense counsel that he was responsible for having her transported from King County to Clallam County. RP (8/10/07) 8-12.

Counsel made the arrangements suggested by the court, but on the second day of trial, the facility where Kreaman was serving her DOSA sentence refused to allow her to attend (unless she was escorted to and from the facility). RP (8/14/07) 7-9. Accordingly, Kreaman's testimony was presented by telephone instead of live testimony in the jury's presence. RP (8/15/07) 160-180.

The state's acts and omissions deprived Ms. Charles of her right to compulsory process. First, Kreaman was in state custody, serving a DOSA sentence. Second, the state never objected to the transport orders obtained by defense counsel starting on July 20, 2007, and, in fact, suggested that the order be amended to command the sheriff to transport Kreaman. RP (7/30/07) 6. Third, the state did not act to ensure that Kreaman was transported in time for trial.

Kreaman's testimony was critical to Ms. Charles' defense, and the primary issue at trial involved a credibility determination. The jury had to

decide whether it believed the testimony of Ms. Charles, Kreaman, and Trujillo-Akuna (that Tvrdik swung at Ms. Charles first and kicked her during the struggle) or the testimony of Madrigal and Tvrdik (that Ms. Charles swung first and Tvrdik did not strike back).

Because Kreaman's testimony was presented by telephone, the jury did not have an opportunity to observe her demeanor and judge her credibility. Kreaman was unable to draw a diagram for the jury, or to examine the diagrams drawn and referred to by the other witnesses. She was also unable to review her statement, which the state later used to impeach her testimony in violation of ER 613(b).

The state's acts and omissions resulted in the loss and erosion of material evidence favorable to Ms. Charles, and violated her constitutional right to compulsory process. Her conviction must be reversed and the case remanded for a new trial. *Filippi, supra.*

II. THE TRIAL COURT ALLOWED IMPEACHMENT OF KREAMAN WITH EXTRINSIC EVIDENCE IN VIOLATION OF ER 613(B).

ER 613(b) requires that a witness be confronted with a prior inconsistent statement before extrinsic evidence of that prior statement may be admitted:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice

> otherwise require…
> ER 613(b).

The state did not confront Kreaman with her allegedly inconsistent statements, and Ms. Charles was not afforded a full opportunity to show prior statements to Kreaman, since Kreaman was not present in the courtroom. Despite this, the trial judge allowed the state to impeach Kreaman with extrinsic evidence, over defense counsel's objections. RP (8/15/07) 160-161, 165-166. This violated ER 613(b).

During closing arguments, the prosecutor raised the alleged discrepancies between Kreaman's testimony and her prior statements:

> The testimony you heard from Ms. Kreaman by telephone. I suggest to you, ladies and gentleman, that her testimony just to put it lightly was a little unsure. She denied certain things that were in her statement that Deputy Boyd came and testified to you about, but she admitted closer in time would more likely to be closer in truth. So I suggest to you, ladies and gentlemen, that what you heard from Deputy Boyd would be more likely to be the truth.
>
> She told you that the Defendant was saying nothing when this was taking place here, the initial interaction. Officer Martin told you the Defendant was doing most of the talking, most of the verbalization. She told you she didn't see exactly what happened. She mentioned nothing about any kicking in her statement. Nothing about the Defendant trying to defend herself. And nothing with respect to any mutual combat.
> RP (8/15/07) 213.

Because Kreaman's credibility was critical, the trial court's error in allowing extrinsic evidence prejudiced Ms. Charles' right to a fair trial.

The conviction must be reversed and the case remanded for a new trial. ER 613(b).

III. THE TRIAL COURT'S IMPROPER USE OF AN "AGGRESSOR" INSTRUCTION REQUIRES REVERSAL.

The "aggressor doctrine" embodied in WPIC 16.04 is derived from the common-law rule that a person who provokes a fight may not claim self-defense. *See, e.g., State v. McCann*, 16 Wash. 249, 47 P. 443, at 449 (1896) ("The instructions requested by the defendants upon the subject of self-defense were not applicable to the facts of this case, where they were themselves the original aggressors, and for that reason they were properly refused by the court...").

Aggressor instructions are not favored. *State v. Birnel*, 89 Wn. App. 459 at 473, 949 P.2d 433 (1998), *citing State v. Kidd*, 57 Wn. App. 95 at 100, 786 P.2d 847, *review denied*, 115 Wash.2d 1010, 797 P.2d 511 (1990). The Supreme Court has noted that

> an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.
> *State v. Riley*, 137 Wn.2d 904 at 910 n. 1, 976 P.2d 624 (1999).

It is error to give an aggressor instruction unless the instruction is supported by credible evidence that the defendant provoked the need to act in self-defense. *Birnel, at* 473; *see also State v. Wasson*, 54 Wn. App. 156

at 158-59, 772 P.2d 1039, *review denied,* 113 Wash.2d 1014, 779 P.2d 731 (1989). The aggressive behavior must be an intentional act other than the actual crime, and must be one that a jury could reasonably assume would provoke a belligerent response.[3] *Kidd*, at 100; *Wasson, at* 159; *Birnel, at* 473. It must be more than mere words, *Riley*, *supra*, and must also be unlawful. *See* Section B, *below*.

Here, the trial court's erroneous use of an aggressor instruction stripped the defendant of her ability to argue self-defense. Because of this, the conviction must be reversed. *Birnel, supra; Wasson, supra.*

A. Ms. Charles was not the aggressor because she did not create the necessity for acting in self-defense.

Under the state's theory of the case, Tvrdik insulted Ms. Charles, who then followed Tvrdik to her cell and assaulted her. RP (8/15/07) 194-217, 241-244. Under the defense theory, Tvrdik insulted Ms. Charles, who then followed Tvrdik to her cell and was assaulted by her. RP (8/15/07) 217-241. Both theories begin with Tvrdik's insults; neither theory includes any intentional act by Ms. Charles—other than the alleged assault itself—reasonably likely to provoke a belligerent response.

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[3] A typical example of an appropriate case for an aggressor instruction is where a pickpocket takes someone's wallet and then seeks to use force to defend against the victim's response.

The state argued that Ms. Charles precipitated the confrontation by following Trvdik to her cell during the argument. But this cannot be the basis for an aggressor instruction. Under the state's interpretation of the aggressor rule, a teenager who followed his father from one room to another during an argument about the family car would be subject to assault, and could not defend himself. A wife who followed her husband into the bedroom while the two were fighting about finances would also be subject to assault, and could not defend herself.

There was no evidence to suggest that Ms. Charles acted to precipitate the confrontation. In the absence of such evidence, the aggressor instruction was improper.

B. Ms. Charles was not the aggressor because she did not perform an *unlawful* aggressive act.

The proponent of an aggressor instruction must establish that the aggressive act was unlawful. This is so even though the modern instruction (WPIC 16.04) does not require a jury determination of unlawfulness. Instead, the unlawfulness of the defendant's provoking act must be established to the trial court's satisfaction before an aggressor instruction may be given to the jury. This is evident from the instruction's evolution.

1. Early aggressor instructions required "lawless acts."

An early aggressor instruction was approved in *State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930):

> You are instructed that no man can by his own *lawless* acts create a necessity for acting in self-defense and thereupon assault and injure or kill the person with whom he seeks the difficulty, and then interpose as a defense the plea of self-defense. Self-defense is the plea of necessity as shield only to those who are without fault in occasioning an affray, and acting under it. Therefore, if you find from the evidence beyond a reasonable doubt that the defendant was the aggressor and that by his own acts and conduct he provoked or commenced the affray, then the plea of self-defense is not available to him.
> *Turpin, at* 113, *emphasis added.*

An identical instruction was at issue some 33 years later in *State v. Thomas*, 63 Wn.2d 59, 385 P.2d 532 (1963) ("*Thomas I*"), *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974). In that case, the defendant argued that the instruction was inappropriate "because there was no evidence submitted that showed Mr. Thomas had committed any *unlawful* acts which might have occasioned the affray." *Thomas I*, 103 Wn.2d at 65, *emphasis added*. The court rejected the defendant's argument, citing a list of illegal and threatening conduct by Mr. Thomas. *Thomas I*, at 65.

In *State v. Upton*, 16 Wn. App. 195, 556 P.2d 239 (1976), the Court of Appeals admonished the trial court not to use an aggressor instruction on retrial, stating:

> [N]o evidence was introduced in the present case indicating the defendant had committed *illegal or unlawful acts* which might have occasioned the assault. Reference to *'lawless acts'* therefore should be omitted if, upon retrial, no evidence is introduced upon which a jury could premise a finding that the defendant created the necessity to act in self-defense through some *illegal or unlawful act*.
> *Upton, at* 204, *emphasis added*.

Similarly, in *State v. Bailey,* 22 Wn. App. 646, 591 P.2d 1212 (1979), the court directed the trial court to reexamine the evidence before giving this same instruction on retrial:

> We are not persuaded, under the record before us, that Mrs. Bailey committed a *"lawless act"* which created a necessity for acting in self-defense... While this is a proper instruction in a proper case... the facts here are similar to those in [*Upton, supra*], where the court held that the facts then before it did not suffice to premise a finding that the "defendant created the necessity to act in self-defense through some *illegal or unlawful* act."
> *Bailey*, 22 Wn. App. at 650 - 651, *emphasis added*.

Historically, the definition of aggressor and the denial of self-defense (as it had evolved) was predicated on *illegal* activity precipitating the fight.

2. WPIC 16.04 originally required an "unlawful act."

In 1977, the Washington Pattern Instructions – Criminal were published. The language in WPIC 16.04 retained the requirement of illegal activity:

> No person may by any *unlawful* act create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a

> reasonable doubt the defendant was the aggressor and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.
> WPIC 16.04, *original version, emphasis added, certain bracketed material deleted.*

In 1985, this original version of WPIC 16.04 was held to be unconstitutionally vague because of the word "unlawful." *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985). In *Arthur,* the defendant was involved in an automobile accident. The victim was stabbed while trying to stop the defendant from leaving the scene. The defendant testified that he acted in self-defense because he feared the victim was attacking him. (*Arthur*, *at* 121). The court instructed the jury using the original WPIC 16.04, quoted above.

The defendant argued on appeal that there was no evidence of any unlawful act, since all of the witnesses agreed that the collision was accidental. The Court of Appeals reversed the conviction:

> The problem with the instruction is that determination of whether there was an 'unlawful act' requires us to speculate and conjecture as to which act of the defendant might have been characterized by the jury as 'unlawful.'
> . . .
> The denial of the self-defense theory where the conduct of the defendant could be deemed accidental is not rational, reasonable, or fair. . . . Under the instruction given, if the jury were to find the collision accidental, they could determine that the act constituted reckless or negligent driving. They might also conclude that this was an unlawful act which provoked the incident

> leading to the stabbing. According to the instruction, they would be precluded from considering Arthur's claim of self-defense. *Arthur*, *at* 123-124.

The Court went on to state that "An aggressor instruction must be directed to intentional acts which the jury could reasonably assume would provoke a belligerent response by the victim." *Arthur*, at 124. In so holding, however, the Court did *not* remove the requirement that the act be unlawful; instead, it (implicitly) assigned that determination to the court rather than the jury, and clarified that the act must be intentional.

Subsequent to the *Arthur* case, the Washington Supreme Court held that the use of the word "unlawful" in an aggressor instruction did not necessarily render the instruction unconstitutionally vague. In *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986), after noting that it was the defense who requested that the word "unlawful" be included in the instruction, the Court distinguished *Arthur*, stating:

> This is also not a case where the defendant's acts could be deemed accidental, as was the situation in [*Arthur*]. In the present case, the jury's attention was directed to the defendant's intentional acts (shooting at two policemen) that allegedly provoked the victim's response (shooting back). While these acts were not specified in instruction 33, *the evidence of unlawful conduct was clear*. *Hughes*, 106 Wn.2d at 193, *emphasis added*.

Following the *Hughes* decision, the Court of Appeals found occasion to revisit the issue in *State v. Hardy*, 44 Wn. App. 477, 722 P.2d

872 (1986). In *Hardy*, the court reiterated that the use of the word "unlawful" in the instruction was improper:

> [T]he aggressor instruction in the case *sub judice* fails to define the phrase "unlawful act." There was conflicting testimony whether Hardy [the defendant] or Peek [the victim] made the first advance prior to the fight. Hence, we do not know whether the jury found that Hardy made the initial advance, or concluded that, although Peek made the initial advance, Hardy acted "unlawfully" in calling Peek a "whore," therefore precluding her from asserting self-defense. *Since calling a person a whore is not an unlawful act, there is an undeniable possibility that the jury, by treating the name-calling as an unlawful act, improperly denied Hardy her claim of self-defense*.
> *Hardy, at* 484, *emphasis added*.

Again, the Court did not delete the requirement of unlawfulness, but instead suggested that an unguided determination by the jury was bound to violate the defendant's rights.

In *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584 (1987), the defendant argued that the use of the word "unlawful" rendered the instruction unconstitutionally vague; the court ruled otherwise:

> ...Thompson's *unlawful conduct*, consisting of drawing his weapon, was the only conduct upon which the jury could base a denial of his self-defense theory. Therefore, although we have stated before and reiterate that WPIC 16.04 as written is vague and overbroad *unless directed to specific unlawful intentional conduct*, we find any error here to be harmless.
> *Thompson, at* 8, *emphasis added*.

This is consistent with the Supreme Court's holding in *State v. Riley, supra*. In that case, the Court held that words alone could not

provide the basis for an aggressor instruction. In reaching this conclusion, the Court explained the aggressor rule:

> [T]he reason one generally cannot claim self-defense when one is an aggressor is because "the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense." *Riley*, *at* 911, *quoting* 1 LaFave and Scott, *Substantive Criminal Law* (1986) , at 657-58.

This explanation has a corollary that is relevant here: if the victim is said to be using *lawful* force, then it follows that the defendant's initial aggression must consist of *unlawful* force. The aggressor instruction must therefore be premised upon a use of unlawful force. *Riley, supra.*

Although the use of the word "unlawful" is not generally favored in the aggressor instruction, an "unlawful act" is still a prerequisite to a finding that the defendant was the aggressor in an altercation.

> 3. Revised WPIC 16.04 requires an initial showing of an unlawful act, although the word "unlawful" no longer appears in the instruction.

In 1986, the first sentence of the WPIC was revised and the word "unlawful" was removed; the modern WPIC reads as follows:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

WPIC 16.04, *certain bracketed material deleted.*

Although the WPIC no longer contains the word "unlawful," the requirement of unlawfulness has not been removed from the underlying substantive law. This can be seen not only from the pre-revision cases which came after *Arthur— see, e.g., Hughes, supra, Hardy, supra*, and *Thompson, supra,* as well as *State v. Brower,* 43 Wn. App. 893, 721 P.2d 12 (1986), ("Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident," at p. 902)—but also from cases addressing the instruction *since* it was revised.

For example, in *State v. Wasson, supra,* the revised aggressor instruction was given where the defendant shot at the victim following a fight with a third party. In ruling that the aggressor instruction was inappropriate, the court noted that "[p]erhaps there is evidence here of an *unlawful* act by [the defendant], a breach of peace. However, there is no evidence that [the defendant] acted intentionally to provoke an assault from [the victim]." *Wasson,* at 159. This language shows that the court was still interested in whether or not the provoking act was "unlawful," despite the absence of that word from the instruction.

Similarly, in *State v. Kassahun,* 78 Wn. App. 938, 900 P.2d 1109 (1995), the defendant was charged with second-degree assault against a

woman (for hitting her on the head with a gun) and second-degree felony murder of her boyfriend (for shooting and killing him). The jury acquitted him of the assault charge (finding that the hitting was either accidental or done in self defense), but was unable to reach a verdict on the murder charge. On retrial, WPIC 16.04 was given and the State argued that the defendant was the aggressor because he had assaulted the victim's girlfriend. The Court of Appeals reversed, holding that this was error:

> The witnesses generally agreed that [the victim's] belligerent behavior . . . resulted from Kassahun having hit [the victim's girlfriend] on the head… [The victim] was heard to complain that Kassahun did not have to hit his girl and to invite Kassahun to put down his gun and fight like a man. Indeed, hitting a young man's girlfriend *per se* is conduct reasonably likely to provoke a belligerent response from the young man. But the State, having failed to prove beyond a reasonable doubt at the first trial that Kassahun hit [the victim's girlfriend] unlawfully… is collaterally estopped from arguing, as it did at the second trial, that Kassahun's conduct [made him the aggressor].
> *Kassahun*, 78 Wn. App. at 950.

If the aggressor rule did not require an unlawful act, the first jury's verdict would have been irrelevant to the determination of whether or not Kassahun was the aggressor.

More recently, this Court has referred to a requirement of proof that the defendant engaged in "wrongful or unlawful conduct" taking place before the actual assault. *State v. Douglas*, 128 Wn. App. 555 at 563, 116 P.3d 1012 (2005). In *Douglas*, this Court reversed the defendant's

conviction, in part because "The record [did] not show that Douglas was the aggressor or that he was involved in any wrongful or unlawful conduct…" *Douglas*, at 564.

Furthermore, all published cases approving the use of revised WPIC 16.04 involve an unlawful act by the defendant. *See, e.g., State v. Kidd, supra* (where the defendant's armed assault and flight from the shooting scene constituted the unlawful conduct); *State v. Davis*, 90 Wn.App. 776 at 781, 954 P.2d 325 (1998) ("*Davis I"*) (where the fact that defendant remained unlawfully in the victim's house constituted the unlawful conduct); *State v. Cyrus*, 66 Wn. App. 502, 832 P.2d 142 (1992) (where the fact that the defendant violently resisted arrest constituted the unlawful conduct); *State v. Davis*, 119 Wn.2d 657, 835 P.2d 1039 (1992) ("*Davis II"*) (where the defendant's assault on a third party constituted the unlawful conduct); *State v. Bennett*, 87 Wn. App. 73, 940 P.2d 299 (1997) (where defendant held a knife to the victim's throat and prevented her from leaving); *State v. Riley, supra,* (where the defendant drew his gun and pointed it at the victim without any provocation).

As the complete history of the aggressor instruction shows, the instruction is only appropriate when the defendant commits an unlawful act that also meets the other requirements of the aggressor rule. *Douglas, supra.*

4. Ms. Charles did not commit an unlawful act.

In this case, Ms. Charles did not commit an unlawful aggressive act prior to the alleged assault. This is true even when the facts are taken in a light most favorable to the state. The prosecutor sought to rely on Ms. Charles' decision to enter Tvrdik's cell. RP (8/15/07) 215-216, 243-244. But this was not an unlawful act: nothing in the record showed that Ms. Charles was barred from any area of M Tank, or that inmates had a right to exclude others from their cells.

Because Ms. Charles did not commit an unlawful aggressive act, the aggressor instruction should not have been given to the jury. The aggressor instruction prohibited the jury from reaching the merits of her self-defense claim; this denied Ms. Charles her right to a fair trial. *Douglas, supra.* For these reasons, the conviction must be reversed and remanded for a new trial. On remand, the trial court should not give an aggressor instruction. *Douglas, supra.*

IV. THE TRIAL COURT'S INCOMPLETE INSTRUCTIONS ON THE LAW OF SELF-DEFENSE FAILED TO MAKE THE RELEVANT LEGAL STANDARD MANIFESTLY APPARENT TO THE AVERAGE JUROR.

Due process requires the state to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. Article. I, Section 3; *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). An omission or misstatement of the law in a jury

instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004) ("*Thomas II*"); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). The failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001). *See State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987).

Where self-defense is raised at trial, the absence of self-defense becomes another element of the offense that the state must prove beyond a reasonable doubt. *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007), *citing State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984). Because of this, self-defense instructions are subject to heightened appellate scrutiny. *Woods, citing State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996). Self-defense instructions must more than adequately convey the law of self-defense: they must make the relevant legal standard

manifestly apparent to the average juror. *Woods*, *supra.* Instructions misstating the law of self-defense create constitutional error that is presumed prejudicial. *Woods, supra.*

A person claiming self-defense has no duty to retreat if assaulted in a place where he or she has a right to be. *State v. Redmond*, 150 Wn.2d 489 at 493, 78 P.3d 1001 (2003). Where the facts suggest that retreat would be a reasonable alternative to the use of force in self defense, "the jury should be instructed that the law does not require a person to retreat when he or she is assaulted in a place where he or she has a right to be." *Redmond,* at 494-495. The failure to provide such an instruction is reversible error. *Redmond, at* 495. Because the absence of self-defense is an element of the offense, reversible error exists even if defense counsel does not propose such an instruction. *Thomas II*, *supra; Randhawa*, *supra; Mills, supra; Kiehl, supra.*

In this case, defense witnesses testified that Ms. Charles acted in self-defense in her altercation with Tvrdik, and the court instructed the jury on the law of self-defense. Instructions No. 12, Supp. CP. However, the court failed to instruct the jury that Ms. Charles did not have a duty to retreat. Court's Instructions, Supp. CP. This was error, and requires reversal. *Redmond, supra.* The error was especially prejudicial because the prosecutor cross-examined defense witnesses about whether or not Ms.

Charles could have left the area during the interaction. RP (8/15/07) 52-53, 113. The prosecutor also emphasized during closing that Ms. Charles could have retreated from the conflict. RP (8/15/07) 215-216, 244.

The trial court's instructions failed to adequately explain the law of self-defense. Because of this, the conviction must be reversed and the case remanded for a new trial. *Redmond, supra; Thomas II, supra.*

V. IF THE ABSENCE OF AN INSTRUCTION EXPLAINING THAT MS. CHARLES HAD NO DUTY TO RETREAT IS NOT PRESERVED FOR REVIEW, THEN MS. CHARLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel…." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), *citing Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Pittman*, 134 Wn. App. 376 at 383, 166 P.3d 720 (2006).

Failure to propose proper instructions on the justifiable use of force constitutes ineffective assistance of counsel. *Woods, supra; see also State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004). In this case, defense counsel proposed an instruction on self-defense, but neglected to propose an instruction explaining that Ms. Charles was entitled to stand her ground in defending herself. Defendant's Proposed Instructions, Supp. CP.

There was no strategic reason for the omission, and, in the absence of such an instruction (and in light of the prosecutor's improper

arguments), the jury might well have speculated that Ms. Charles could have retreated from the conflict. Where such speculation is permitted, reversal is required. *Redmond, supra.*

If the issue of this missing instruction is not preserved for review on its own merits, then it should be reviewed as an ineffective assistance claim. Because Ms. Charles was prejudiced by her attorney's failure to propose a complete set of instructions outlining the law of self-defense, the conviction must be reversed and the case remanded for a new trial. *Woods, supra; Rodriguez, supra.*

VI. MS. CHARLES WAS CONVICTED UNDER A STATUTE THAT VIOLATES THE SEPARATION OF POWERS.[4]

A. The legislature has failed to define the core meaning of the crime of assault.

The doctrine of separation of powers is derived from the constitutional distribution of the government's authority into three branches. *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). The state constitution divides political power into legislative authority (Article II, Section 1), executive power (Article III, Section 2), and

[4] The Supreme Court heard argument on this issue on October 23, 2007. *State v. Chavez*, 134 Wn. App 657, 142 P.3d 1110 (2006), *review granted at* 160 Wn.2d 1021 (2007).

judicial power (Article IV, Section 1). *Moreno,* at 505. Each branch of government wields only the power it is given. *Moreno,* at 505; *State v. DiLuzio*, 121 Wn. App. 822 at 825, 90 P.3d 1141 (2004).

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions" of another. *Moreno,* at 505. A violation of separation of powers occurs whenever "the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Moreno,* at 506, *citations omitted.* Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that are more properly accomplished by other branches. *Moreno at* 506, *citing Morrison v. Olson,* 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the Legislature to define the elements of a crime. *State v. Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000).

> [This is so] because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community. . . . This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'
> U.S. v. Bass, 404 U.S. 336 at 348, 92 S.Ct. 515, 30 L. Ed. 2d 488 (1971), *citations omitted.*

The legislature has criminalized assault; however, it has not defined the core meaning of that crime-- the verb "assault." *See,*

generally, RCW 9A.36.[5] Instead, it has employed a circular definition (in effect, an "assault is an assault"), and allowed the judiciary to define the conduct that is criminalized. The appellate courts have done so, enlarging the definition to criminalize more and more conduct over a period of many years. This violates the separation of powers. *Moreno, supra.*

B. The judiciary has enlarged the definition of "assault" to criminalize more and more conduct over the past 100 years.

At the turn of the last century, Washington's Criminal Code included a definition of assault. In 1906 the Supreme Court noted that "An assault is defined by the Code to be an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution." *State v. McFadden*, 42 Wash. 1 at 3, 84 P. 401 (1906). In 1909, the legislature adopted a new criminal code. The Supreme Court noted that the section defining assault (Rem. & Bal. Code SS 2746) "was repealed by the new

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[5] There are some statutes, not applicable here, which specifically define the elements of certain assault-like crimes, without using the word "assault" in the definition. *See, e.g.*, RCW 9A.36.011(1)(b): "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: …Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance." *See also, e.g.*, RCW 9A.36.031 (1)(d): "A person is guilty of assault in the third degree if he or she... With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." Because these subsections define the core conduct giving rise to criminal liability, they do not violate the separation of powers.

criminal code, and so far as we are able to discover, the term assault is not defined in the latter act." *Howell v. Winters*, 58 Wash. 436 at 438, 108 Pac. 1077 (1910). In the absence of a statutory definition, the Supreme Court imported a definition from the common law, quoting from a treatise on torts:

> "An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; 'A right to live in society without being put in fear of personal harm.'" Cooley, *Torts* (3d ed.), p. 278
> *Howell v. Winters*, at 438.

This common law definition was broader in scope than the pre-1909 code section, because it required only an apparent (as opposed to an actual) ability to inflict bodily injury.

Howell v. Winters was a civil case. It was not until 1922 that the common law definition adopted by *Howell v. Winters* was approved by the Supreme Court for use in a criminal case. In *State v. Shaffer*, 120 Wash. 345 at 348-350, 207 P. 229 (1922), the Supreme Court, consistent with its

holding in *Howell v. Winters*, expanded the criminal definition of assault to cover situations where the defendant lacked the actual ability to inflict bodily injury. The same definition was endorsed again in two cases from 1942. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942) was a civil action for malicious prosecution which turned in part on the criminal law's definition of assault; *State v. Rush*, 14 Wn.2d 138, 127 P.2d 411 (1942) was a criminal case described by the court as being "indistinguishable" from *Shaffer, supra. State v. Rush*, at 140.

Thirty years later, the core definition of "assault" expanded further, again without any input from the legislature. This expansion appeared in *dicta* in the Supreme Court's opinion in *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972). In that case, the Court (in *dicta*) quoted from a federal case on assault:

> There can in actuality be two concepts in criminal law of assault as noted in *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969), *cert. denied*, 396 U.S. 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969).
>
> One concept is that an assault is an attempt to commit a battery. There may be an attempt to commit a battery, and hence an assault, under circumstances where the intended victim is unaware of danger. Apprehension on the part of the victim is not an essential element of that type of assault. . . .
>
> The second concept is that an assault is 'committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.' The concept is thought to have been assimilated into the criminal law from the law of torts. It is usually required that the apprehension of harm be a reasonable one.

State v. Frazier, at 630-631.

Following *Frazier,* Washington's judicially-created definition of assault was enlarged to include (1) actual battery (consisting of an unlawful touching with criminal intent, not necessarily injurious), (2) an attempt to commit a battery (whether or not injury was intended), and (3) placing another in apprehension of harm (whether or not injury was intended). *See, e.g., State v. Garcia,* 20 Wn. App. 401 at 403, 579 P.2d 1034 (1978); *State v. Strand,* 20 Wn. App. 768 at 780, 582 P.2d 874 (1978). These three definitions make up the core definition of the crime of assault today. *See* WPIC 35.50; *see also State v. Smith,* 159 Wn.2d 778, 154 P.3d 873 (2007).

Since the legislature removed the statutory definition of assault from the criminal code in 1909, the judiciary has stepped in to fill the vacuum and has undertaken to define the crime. This violates the separation of powers because it encroaches on a core legislative function. *Moreno, supra; Wadsworth, supra.*

C. Two recent cases incorrectly limit the legislature's responsibility to define crimes.

Two recent decisions address the legislature's responsibility to define crimes. In *State v. David,* the Court of Appeals interpreted *Wadsworth* narrowly:

> When our Supreme Court ruled that the Legislature defines the elements of a crime, it meant that the Legislature must set out in the statute the essential elements of a crime. . . . It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed but has not specifically defined. Nor has this practice generally been viewed as a judicial encroachment on legislative powers. On the contrary, the judiciary would be acting contrary to the Legislature's legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long-standing common-law definitions to fill in legislative blanks in statutory crimes. The Legislature is presumed to know this long-standing common law. *State v. David*, 134 Wn. App. 470 at 481, 141 P.3d 646 (2006), *citations and footnotes omitted.*

In *State v. Chavez*, 134 Wn. App. 657, 142 P.3d 1110 (2006), *review granted at* 160 Wn.2d 1021 (2007), the court expanded on *David*. In a part-published opinion, the court drew an analogy between the assault statute and those statutes defining the crimes of bail jumping, protection order violations, and criminal contempt:

> Although the legislature's function is to define the elements of a crime, the "legislature has an established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing specifics." *Wadsworth*, 139 Wn.2d at 743. For example, the bail-jumping statute criminalizes the failure to appear before a court, RCW 9A.76.170, but the courts determine the dates on which the defendant must appear. *Wadsworth*, 139 Wn.2d at 736-37. In protection-order legislation, the legislature specifies when the orders may be issued and the criminal intent necessary for a violation, but the courts determine the specific prohibitions. *Wadsworth*, 139 Wn.2d at 737. The legislature has broadly defined the elements of criminal contempt as intentional disobedience to a judgment, decree, order, or process of the court, but the courts declare the specific acts of disobedience. *Wadsworth*, 139 Wn.2d at 737. The legislature's history of delegating to the judiciary how statutes will be

> specifically applied demonstrates that the practice does not offend the separation of powers doctrine. . . .
> *Chavez, at* 667.

In each of these situations-- bail jumping, protection orders, and contempt-- the legislature has defined the general crime, and the remaining terms are case-specific. For example, a bail-jumping defendant is charged with failing to appear on a specific court-ordered date applicable to her or his case only. A protection order violation is proved with reference to a specific court order that applies only to the defendant charged. A contempt charge rests on a specific "judgment, decree, order, or process of the court," applicable to the defendant.

Bail jumping, protection order violations, and contempt of court are qualitatively different from the assault statutes, and Division II's analogy to these crimes is inappropriate. The case-specific facts in these crimes stem from judicial action, but otherwise are no different from other (nonjudicial) facts such as the posted speed limit in a reckless driving case, or the ownership of a building in a burglary case. There are no core terms undefined by the legislature in any of these statutes.

The *Chavez* court also found the statute constitutional because the legislature "has instructed that the common law must supplement all penal statutes." *Chavez*, at 667, *citing* RCW 9A.04.060. While this is true, it does not absolve the legislature of performing its essential function in

defining the core meaning of a crime. Nor does the legislature's acquiescence render an unconstitutional division of labor constitutional, as the court suggested. *Chavez*, at 667. The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution.

David and *Chavez* should be reconsidered. The two cases improperly limit the legislature's responsibility, allow the judiciary to determine what conduct constitutes the core of a crime, and give the appellate courts the power to criminalize more and more conduct, as has occurred with the crime of assault over the past century.

D. This court should adopt a rule requiring the legislature to adequately define the conduct that constitutes a crime.

Under *David* and *Chavez,* the legislature need only set forth the elements of the crime without any further guidance. *David, supra, at* 481. In many cases, this will adequately define the conduct constituting a crime. In fact, an example of such a crime is found in RCW 9A.36.031:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: ... (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering...
> RCW 9A.36.031.

Because this subsection adequately defines the core conduct giving rise to criminal liability, they do not violate the separation of powers. By

contrast, RCW 9A.36.021 (1)(a), the section under which Ms. Charles was charged, uses a circular definition of assault: a person is guilty of Assault in the Second Degree if she "Intentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). The circularity is even more stark in RCW 9A.36.041: a person is guilty of assault in the fourth degree if "he or she assaults another."

The problem with such circular formulations is that the core of the crime remains undefined, and the judiciary remains free to expand the crime (as it did in the case of assault.) Indeed, without legislative action, appellate courts could continue to expand the definition of assault to cover more behaviors not currently criminal-- hostile and insulting gestures, for example. Or, again without legislative action, appellate courts could restrict the definition of assault, criminalizing only that conduct that was considered assaultive at the turn of the last century.

This court should adopt a rule that requires a crime to be defined with something more than a bare circular reference to the crime itself. For example, the problems with RCW 9A.36 could be ameliorated with a statutory definition of the term "assault." The legislature has done just that in the theft statute. Like the assault statutes, the statutes criminalizing theft (RCW 9A.56.030 *et seq.*) declare that a person is guilty of theft if he or she commits theft. *See, e.g.,* RCW 9A.56.030, .040, .050. Unlike the

assault statutes, however, the legislature has defined the term "theft." *See* RCW 9A.56.020. In the context of the theft statutes, this definition solves the circularity problem and complies with the constitutional separation of powers.

If this court were to adopt a rule requiring offenses to be clearly defined with something more than a circular definition, the legislature could define assault however it chose. By adopting a noncircular definition, the legislature would avoid the separation of powers problem posed by the current statutory scheme.

E. The conviction must be reversed and the charge dismissed.

The statutory scheme criminalizing assault violates the constitutional separation of powers. Because Ms. Charles was convicted under an unconstitutional statute, her assault conviction must be reversed and the charge dismissed with prejudice.

CONCLUSION

Based on the foregoing, the appellant respectfully requests that the court reverse Niccole Charles' conviction. In the alternative, the case must be remanded for retrial.

Respectfully submitted on April 2, 2008.

BACKLUND AND MISTRY

_____
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 2, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 2, 2008.

_____
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